

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

In re:

Chapter 7 Case
Case No. 9:04-bk-03621-ALP

ROBERT LAING,

Debtor. /

R. TODD NEILSON, Trustee of
The Estate of Reed E. Slatkin and
The Substantively Consolidated
Affiliates Topsight Oregon, Inc.
And Reed Slatkin Investment
Club, L.P., Liquidating Trust,

Plaintiff,

v.

Adv. Pro. No. 04-402

ROBERT LAING,

Defendant /

**ORDER ON MOTION FOR SUMMARY
JUDGMENT ON COUNT I OF COMPLAINT
(HOMESTEAD)**

THIS IS an adversary proceeding in this Chapter 7 liquidation case commenced by a Complaint filed by R. Todd Neilson, Trustee (Neilson) against Robert Laing (Debtor). In Count I of his four-count Complaint, Neilson seeks a determination that the Debtor is not entitled to the homestead provisions of the Florida Constitution, Article X, Section 4, because he is not a bona fide resident of the State of Florida. In the alternative, Neilson contends that even if the Debtor's Florida homestead claim is upheld, Neilson is entitled to the imposition of an equitable lien on the residence. This contention is based on Neilson's claim that the Debtor fraudulently transferred the non-exempt equity in his California home into exempt equity in his current residence, which he is now claiming as his Florida Homestead.

The precise matter under consider is a Motion for Summary Judgment filed by the Debtor directed to the claim in Count I of the Complaint. The Debtor contends that there are no genuine issues of material fact and, therefore, he is entitled to a

judgment as a matter of law that his residence in Naples, Florida, is his homestead and is not subject to administration by the Chapter 7 Trustee.

In his Response in Opposition to the Debtor's Motion for Summary Judgment, Neilson contends that the Motion should be denied because: (1) to establish his homestead Laing must prove that he had the actual intent to live permanently at his claimed homestead and that he actually used and occupied that property; (2) that case law makes abundantly clear that, because Laing's actual intent is a critical issue, summary judgment is inappropriate and; (3) even if summary judgment were otherwise appropriate, he has been unable to conclude discovery on the issue of homestead exemption, consequently the Motion should be denied or continued pursuant to Fed. R. Civ. P. 56(f), made applicable by F.R.B.P. 7056.

In support of these contentions, Neilson maintains that there is reputable authority to support the proposition that the Motion for Summary Judgment should be continued and not heard if the moving party has not had an opportunity to conduct full discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Temkin v. Frederick County Comm'rs, 945 F.2d 716, 719 (4th Cir. 1991), cert. denied, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992), In re Bilzerian (S.E.C. v. Bilzerian), 190 B.R. 964 (Bank. M.D. Fla. 1995). He further maintains that Fed. R. Civ. P. 56(f) permits a court to deny summary judgment or to order a continuance if the nonmoving party shows through affidavits that it could not properly oppose a motion for summary judgment without a sufficient opportunity to conduct discovery.

According to Neilson, the Affidavit of Luis Salazar filed in opposition to the Motion for Summary Judgment substantiates his contention that he has not had the opportunity to conclude the necessary discovery. Specifically, he did not receive certain documents requested from the Debtor until October 6, 2004, and did not receive additional requested documents along with the answers to interrogatories until November 1, 2004, just 16 days before the hearing on the Motion for Summary Judgment.

Further, Neilson contends that the Debtor's wife, Lynelle Laing, is an indispensable witness whose testimony is relevant and material to the Debtor's homestead exemption claim. Neilson sought to serve his subpoena for deposition upon Mrs. Laing at the address for her listed on the

Debtor's schedules, to no avail. He was only able to locate her new address through the use of a private investigator.

Based on the foregoing, it is the opinion of this Court that it is inappropriate and premature to consider the Debtor's Motion for Summary Judgment until Neilson has had a reasonable opportunity to complete necessary discovery.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that ruling on the Defendant's Motion for Summary Judgment on Count I of Complaint (Homestead) be, and the same is hereby, deferred pending the conclusion of the deposition testimony of Mrs. Lynelle Laing. It is further

ORDERED, ADJUDGED AND DECREED ORDERED, that a pre-trial conference shall be held on January 20, 2005, beginning at 9:00 a.m. at the United States Bankruptcy Courthouse, Fort Myers, Federal Building and Federal Courthouse, Room 4-117, Courtroom D, 2110 First Street, Fort Myers, Florida, to frame issues for trial and to consider all pending motions, if any, that were deferred pending resolution of the summary judgment motion. It is further

ORDERED, ADJUDGED AND DECREED that a final evidentiary hearing on this matter shall be held on February 23, 2005, beginning at 11:00 a.m. at the United States Bankruptcy Courthouse, Fort Myers, Federal Building and Federal Courthouse, Room 4-117, Courtroom D, 2110 First Street, Fort Myers, Florida.

DONE AND ORDERED at Tampa, Florida, on December 13, 2004.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
United States Bankruptcy Judge